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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRIAN SNAVELY, Plaintiff and Appellant, v. DEPARTMENT OF SOCIAL SERVICES, Defendant and Respondent.	G035745 (Super. Ct. No. 04CC03776) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed.

Law Offices of Vincent W. Davis & Associates, Vincent W. Davis, Ilia Serpik, and Denise M. Hippach for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Thomas R. Yanger, Assistant Attorney General, John H. Sanders and Carol W. Schultz, Deputy Attorneys General for Defendant and Respondent.

Based on allegations of a sexual molestation, the Director of the Department of Social Services (the Department) served Brian Snavely with an order of immediate exclusion from any licensed day care facility. Snavely was forced to leave his home, which was also a child day care. After several months of further investigation, the Department held a hearing and decided a formal exclusion order was warranted. Snavely challenged the permanent exclusion order by filing a petition for a writ of mandate. This appeal concerns the trial court's denial of Snavely's petition. He does not argue the evidence was insufficient to support the trial court's ruling. Rather, he contends the Department lost jurisdiction over the case because it failed to follow the mandatory timelines for the accusation and hearing delineated in Health and Safety Code section 1596.8897. (All further statutory references are to the Health and Safety Code, unless otherwise indicated.) We find his appeal lacks merit and affirm the judgment.

I

Twenty-four-year-old Snavely was a Scoutmaster with the Boy Scouts of America. He began dating one of the scouts' mothers. When the relationship soured, the mother accused Snavely of molesting her 11-year-old child during a camping trip nearly one year earlier, in July 2001.

In April 2002, the mother and Snavely were interviewed by Officer Kelly Core from the Irvine Police Department. The investigation was closed with an initial finding of "unfounded."

Approximately five months later, the investigation was reopened during a departmental "quality assurance" audit and assigned to Senior Special Investigator Ronald Tate. Tate opined the case required further investigation because the child had not been interviewed by the police department's investigator, Gabriella Zuniga.

In September 2002, Tate interviewed the child, but found he was not "totally forthcoming" and was "evasive" about the alleged camping incident.

Nevertheless, in October 2002, Tate prepared a report stating he believed the allegations of lewd and inimical conduct had been sufficiently substantiated.

At that time, Snavely was living with his mother, who operated a child day care center at home. On October 24, 2002, the Department sent Snavely an order of immediate exclusion from any child care facility. Snavely moved to his grandparent's home. The next day, on October 25, 2002, Snavely's attorney filed a letter response requesting a hearing.

In December 2002, the child was interviewed again, but this time by a member of the Child Abuse Service Team (CAST). For the first time, the child admitted he and Snavely showered together at the campground and Snavely touched the minor's penis briefly.

A few months later, in May 2003, Tate interviewed the child again because the mother indicated he was ready to disclose more information. After initially being reluctant to talk, the child stated sexual acts had occurred between he and Snavely in the shower at the campground. On May 6, 2003, Snavely was served with a formal accusation, requesting he be permanently excluded from his mother's home/day care facility. Snavely quickly filed a notice of defense and request for a hearing.

On August 12, 2003, Snavely's counsel filed a motion to dismiss the accusation. He asserted section 1596.8897 requires that once a written appeal is made by the excluded person, the Department shall serve an accusation within 30 days. In this case, the Department waited over six months to serve the accusation. The Department filed its opposition to the motion on August 29, 2003.

Administrative Law Judge Timothy S. Thomas considered the matter on August 12 through 14, and September 15 through 17. On October 14, 2003, Judge Thomas denied the dismissal motion, concluding the statute requiring the Department to serve the accusation within a certain time was "'directory only'" and the "'primacy of the goal of public protection contained in the applicable statutes outweigh[ed] [Snavely's]

interest in a timely hearing.'" Judge Thomas issued a proposed order stating Snavely was permanently prohibited from any facility licensed by the Department. On December 12, 2003, the proposed decision was adopted by the Department.

Snavely challenged the order by filing a petition for a writ of mandate. He argued there was insufficient evidence to support the permanent exclusion ruling and the dismissal motion should have been granted. Trial Judge Corey S. Cramin considered argument from the parties and denied the petition.

II

The issue presented in this appeal is whether the Department violated section 1596.8897 and Snavely's constitutional rights. Specifically, Snavely believes we must determine whether the Legislature's use of the word "shall" throughout section 1596.8897, subdivision (c), was mandatory or directive. We conclude this analysis is unnecessary because subdivision (c), concerns a temporary order, which is not the subject of this appeal.

A. Background and Content of Section 1596.8897

We will begin by discussing the purpose and the scope of authority given to the Department under section 1596.8897. The first subdivision introduces the statutory scheme and generally authorizes the Department to prohibit any person from employing, or allowing in, or allowing contact with clients in a licensed facility a person who has engaged in conduct listed in subsections (1) through (5). (§ 1596.8897, subd. (a)(1)-(5).) Relevant to this case, subsection (2), states persons to be excluded include those "[e]ngaged in conduct which is inimical to the health, morals, welfare, or safety of either an individual in or receiving services from the facility, or the people of the State of California." (§ 1596.8897, subd. (a)(2).)

Next comes subdivision (b), which outlines the notification procedure to be followed. "The excluded person . . . shall be given written notice of the basis of the [D]epartment's action and of the excluded person's right to an appeal." (§ 1596.8897,

subd. (b).) The person has 15 days to file an appeal, and if he or she fails to do so, "the [D]epartment's action shall be final." (*Ibid.*) If the person files an appeal, a hearing "shall be conducted in accordance with Chapter 5 . . . of Division 3 of Title 2 of the Government Code. The standard of proof shall be the preponderance of the evidence and the burden of proof shall be on the [D]epartment." (§ 1596.8897, subds. (d) & (e).)

Under special circumstances, the Department can also order immediate removal of the person from the licensed facility as a protective measure until the hearing and ruling on the merits. In essence, the Department is given the functional equivalent of a temporary restraining order. Subdivision (c), outlines the rules and procedures for this temporary type of order in four subsections. (§ 1596.8897, subd. (c)(1)-(4).)

First, section 1596.8897, subdivision (c)(1), provides the Director of the Department with broad discretion to determine if immediate removal is necessary. Specifically, the Department may immediately remove the person "from a facility pending a final decision of the matter, when, in the opinion of the [D]irector, the action is necessary to protect residents or clients from physical or mental abuse, abandonment, or any other substantial threat to their health or safety." (§ 1596.8897, subd. (c)(1).)

The second subsection provides "the [D]epartment shall serve an order of immediate exclusion upon the excluded person which shall notify the excluded person of the basis of the [D]epartment's action and of the excluded person's right to a hearing." (§ 1596.8897, subd. (c)(2).)

Subsection (3), sets out several deadlines for the Department to follow. If the excluded person timely files an appeal following the order of immediate exclusion, "The [D]epartment shall do the following . . . . [¶] (A) Within 30 days of receipt of the appeal, serve an accusation upon the excluded person. [¶] (B) Within 60 days of receipt of a notice of defense by the employee or prospective employee pursuant to [s]ection 11506 of the Government Code, conduct a hearing on the accusation." (§ 1596.8897, subd. (c)(3)(A) & (B).)

The final subsection concerning the orders of immediate exclusion provides an outside time limit for the order's effectiveness: "An order of immediate exclusion of the excluded person from the facility shall remain in effect until the hearing is completed and the [D]irector has made a final determination on the merits. However, the order of immediate exclusion shall be deemed vacated if the [D]irector fails to make a final determination on the merits within 60 days after the original hearing has been completed." (§ 1596.8897, subd. (c)(4).)

The rest of section 1596.8897 concerns additional rights and duties of the excluded person and the Department. For example, subdivision (d), provides the person who files an appeal must notify the Department of any change in mailing address. (§ 1596.8897, subd. (d).) Subdivisions (f) and (g), concern the Department's authority to initiate a disciplinary proceeding against the excluded person. (§ 1596.8897, subds. (f) & (g).) And finally, subdivision (h), concerns the excluded person's right to appeal the exclusion order or seek reinstatement.

B. Scope of this Appeal

It is undisputed the Department failed to follow the deadlines stated in subdivisions (3)(A), (3)(B), and (4) of section 1596.8897, subdivision (c). The accusation was not served within 30 days of the appeal, but rather more than six months later. (§ 1596.8897, subd. (c)(3)(A).) Similarly, the hearing was not held within 60 days of receipt of the notice of defense. (§ 1596.8897, subd. (c)(3)(B).) And finally, the Director did not make a final determination within 60 days after the original hearing had been completed, but took approximately three months. (§ 1596.8897, subd. (c)(4).)

However, the three deadlines delineated in subdivision (c), of section 1596.8897 govern only orders of immediate exclusion, which is not the subject of Snavely's appeal. Rather, Snavely appeals from the court's denial of his petition seeking reversal of the "Order of Exclusion issued on October 4, 2003, and made effective on December 12, 2003, *permanently prohibiting* . . . Snavely from employment in, presence

in, and from contact with clients of any facility licensed by the . . . Department . . . ." (Italics added.) In other words, the scope of this appeal is limited to the final exclusion determination, not the temporary protective order that was in effect before and during the hearing. That temporary order no longer has any effect. It was replaced by the final ruling and is no longer subject to review.

As discussed above, the various deadlines described in subdivision (c), of section 1596.8897 apply only when the Department has determined an order of immediate removal is required. Recognizing a person has been removed simply due to the discretionary call of the Department's director, and without due process or a hearing, the Legislature necessarily requires the Department to expedite the hearing process on the underlying matter. The immediate order of exclusion is given a limited life span of only a few months before it must be deemed vacated. However, we found no indication in the statutory scheme that elimination of this protective and temporary order would limit the Department's jurisdiction to make a final determination on the merits.

We recognize that at first glance the 60-day deadline provided in subsection (4), of section 1596.8897, subdivision (c), appears to concern both the emergency temporary order and final ruling of exclusion. However, on closer examination, we conclude it does not. Subdivision (c)(4) provides the order of immediate exclusion "shall remain in effect until the hearing is completed and the [D]irector has made a final determination on the merits." (§ 1596.8897, subd. (c)(4).) This rule is subject to one exception: If the Director fails to make a final decision within 60 days after the hearing has been concluded, "the order of immediate exclusion shall be deemed vacated." (*Ibid.*) It does not provide any express or implied consequence as to the Director's ability to make a final decision. Only the viability of the emergency immediate order of exclusion is affected by a delayed ruling.

We find it telling the Legislature did not provide any time frame or deadline for the Department's director to make a final exclusion determination for situations that do not require an order of immediate exclusion. If the Department had not proceeded under subdivision (c)'s order of immediate removal, then subdivision (b), would have applied. (§ 1596.8897, subds. (b) & (c).) It does not designate any timelines as to when the Department must hold the hearing or make final determination. After receiving notice and filing a response, the person would have waited for a hearing "conducted in accordance" with Government Code section 11500 et seq., as discussed in subdivision (e), of section 1596.8897. Under those provisions, the Department "shall determine the time and place of the hearing[]" giving the parties at least 10-days notice prior to the hearing. (Gov. Code, §§ 11508, 11509.) The statute provides no other deadlines or consequences affecting the Department's jurisdiction.

Before concluding, we wish to clarify that we do not at all condone the Department's conduct in this case. That one person (the director) could expel a person from his home for six months based on allegations, without the benefit of a timely formal accusation or hearing, is disconcerting. Certainly, before the hearing, Snavely could have sought court intervention to address the delay. We remind the Department to balance its goals of protecting children with the need to respect the rights of the accused excluded person. The Legislature intended the order of immediate exclusion to be used as an interim procedure, not as a stalling tactic. More egregious facts may raise due process concerns of a magnitude that would compel a different result.

III

The final exclusion judgment is affirmed. In the interests of justice, neither party shall recover costs on appeal. (Cal. Rules of Court, rule 8.276(a)(5).)

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.